

Q-and-A for case 20-1-06432-3

The basics:

- **Time/Date:** The shots were fired at 6:16 p.m., May 31, 2019
- **Place:** The shooting was outside, near the entrance of the Sunshine Grocery at 1402 Auburn Way North in Auburn.
- **Charges:** Murder in the Second Degree; Assault in the First Degree
- **Officer:** Auburn Police Officer Jeffrey Nelson
 - o **DOB:** 9-29-78
 - o **Height/weight:** 6-foot, 223 pounds
- **Victim:** Jesse Sarey
 - o **DOB:** 7-10-92
 - o **Height/weight:** 5-foot-5, 146 pounds
- **Date case filed:** August 20, 2020
- **Case number:** 20-1-06432-3

Why did this investigation take so long?

The investigation was delivered by police to the King County Prosecuting Attorney's Office in November 2019. We then began the process of engaging experts. The video analysis was crucial to us and was not completed until March. The video work was foundational to the work done by the use-of-force experts. They completed their reports in June. Between June and August, we have had internal discussions leading to the charging decision today.

Who conducted the investigation? Was it done independent of the Auburn Police Department?

This case was investigated by the Valley Investigations Team (VIT). The lead agency was the Port of Seattle Police Department. The VIT completed the majority of the investigation.

Is this case different because of Initiative 940? If so, how?

Initiative 940 is the change in the law regarding police use of force cases that was approved overwhelmingly by voters statewide in fall 2018, and it took effect in 2019. Among other things, I-940 substantially changed the legal standard for criminally prosecuting police officers in instances of deadly force. Before I-940, prosecutors in Washington state had to show that officers acted with malice and a lack of good faith, which was essentially an impossible standard to meet. Under the new law, prosecutors have greater ability to bring criminal charges against police officers in cases involving deadly force.

This case is our first in which we are applying the new law. As such, we no longer are required to prove “malice” or “bad faith” on the part of the officer, which the law required until I-940. The new legal standard focuses on whether the action taken by the officer is reasonable. A jury must now decide whether the officer acted in good faith. The statute provides:

A peace officer shall not be held criminally liable for using deadly force in good faith.

Good faith is an objective standard which shall consider all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.

Why did you need/use experts?

We felt it was critical to understand all the events depicted in the video. To do that well required expertise. Use of force experts were also essential to help understand the intersection between police training/tactics and the new legal standard that focuses on the “reasonable” officer. That standard is detailed in the question about I-940. Additional details about the experts are included in the Certification for Determination of Probable Cause filed with the charging documents.

What is the significance of the two charges, homicide and assault?

We assert that Officer Nelson’s actions with respect to both shots were unreasonable. However, we recognize that the jury will have to decide each application of deadly force independently. Considering that legal reality, we have brought a charge to reflect each gunshot. The murder charge relates to the first shot which ultimately brought about Mr. Sarey’s death. The assault charge relates to the second shot to the head, which, remarkably, was determined by the King County Medical Examiner not to be an immediate fatal shot.

What made the shots fired in this case unreasonable? How are you sure that the standard under I-940 was met?

The new legal standard under I-940 focuses on whether the action taken by the officer is reasonable; and our position is that Officer Nelson’s actions with respect to both shots were unreasonable. However, we recognize that the jury will have to decide each application of deadly force independently.

Considering that legal reality, we have brought a charge to reflect each gunshot. The murder charge relates to the first shot which ultimately brought about Mr. Sarey’s death. The assault charge relates to the second shot to the head, which, remarkably, was not clearly a fatal wound, according to the King County Medical Examiner.

Numerous facts resulting from our investigation and the analysis of our use of force experts led to the conclusion that Officer Nelson’s application of deadly force was not reasonable or necessary.

First, Officer Nelson did not wait for the backup he had requested, which would have significantly reduced the chance that lethal force was necessary.

Second, Officer Nelson had access to less-lethal options as he approached Mr. Sarey, including his K-9 and the Taser strapped to his thigh, which was never deployed.

Third, Officer Nelson did not follow proper tactics and de-escalation techniques common to modern policing and a part of Auburn Police Department's policy and training.

At the time of the initial shot, the evidence is clear: the knife was on the hood of Mr. Woodard's car and the gun was fully in the possession of Officer Nelson. As such Mr. Sarey did not pose a threat of death or serious physical harm to Officer Nelson, according to our expert.

Having suffered a gunshot to the abdomen, Mr. Sarey can be seen in the video falling immediately to the ground. He slides to his buttocks, with his feet stretched toward Officer Nelson. He is falling backwards onto his arm and back when Officer Nelson fires a second round into Mr. Sarey's forehead, 3.44 seconds after the first shot.

The certification for determination of probable cause – the part of the documents that are required for a felony filing – contains additional details. Court documents in this case are public and anyone can retrieve them through the [Electronic Court Records](#) system by searching case number 20-1-06432-3 KNT. We hope the public looks at the details in those public court filings, and we believe our reasoning will be better understood after reviewing those documents.

Was backup available?

Before Officer Nelson confronts Mr. Sarey, two officers responded to his call for backup. That is audible on the recording captured by Officer Nelson's patrol vehicle dashboard camera and police radio.

Did Officer Nelson have a body-worn camera?

No.

Did Officer Nelson have a Taser?

Yes. It was not deployed.

Was Mr. Sarey armed?

No.

What is the possible sentence range?

The sentence follows guidelines set by the State Legislature. Mr. Nelson could face 123 to 220 months if convicted on both counts. He could face 93 months to 123 months if convicted on only the Assault in the First Degree count.

Are you asking that Officer Nelson be held in custody pending trial?

We are not requesting bail, but we plan to ask a judge that Mr. Nelson not have access to firearms. That would also have the effect of keeping him from carrying a firearm while working in law enforcement, which we believe is important. A judge will ultimately make that decision. We believe this decision is fair considering the amount of time that has passed since this event and considering we are asking the court to order that he not carry a firearm while this case is pending.

Where is the surveillance video from, and what should we know about the videos?

The videos are from neighboring businesses with views of the Sunshine Grocery, where the shooting occurred.

The time is incorrect on the videos from the businesses. Those were synced by our video experts to match with the correct time sync on Officer Nelson's patrol vehicle dashboard camera.

Officer Nelson's patrol vehicle dashboard camera does not capture the shooting. It does record the audio. That camera is the only one of the three cameras that recorded audio.

The surveillance video on the west is approximately 147 feet away from the shooting location. The surveillance video to the east is approximately 194 feet from the shooting location. Those videos were enlarged by the video expert hired by the King County Prosecutor's Office during the case review. Those videos are being released publicly by our office.

There is a portion of the west video that goes to black briefly. Our expert determined surveillance video was not recorded by that camera for those frames. That is not an omission by our office. The camera to the east was recording.

The videos were obtained by the Valley Investigations Team and referred to our office as part of the case referral for a filing decision.

Here is a key to the file with all videos:

1. Officer Nelson's patrol vehicle dashboard camera
2. West video from neighboring business, approximately 147 feet away
3. Close-up of video 2, magnified by video expert
4. East video from neighboring business, approximately 194 feet away
5. Close-up of video 4, magnified by video expert



Here is a key to video from King County Prosecuting Attorney Dan Satterberg's presentation:

1. Close-up of west video from neighboring business, magnified by video expert
2. Close-up of east video from neighboring business, magnified by video expert
3. Timecode from Officer Nelson's patrol vehicle dashboard camera.



Is the muffled noise when Officer Nelson makes contact with Mr. Sarey the first gunshot?

No. The investigation showed that was the sound of Officer Nelson's body-worn microphone making contact. The first gunshot is at 6:16:00 (from the time code on Officer Nelson's patrol vehicle dashboard camera) and the second gunshot is at 6:16:03.

Is Mr. Sarey's body seen in front of the ice box to the left of Officer Nelson's patrol vehicle in the left video?

No. That is a motorcycle parked to the right of the vehicle witness Steven Woodard was in. Mr. Woodard exits the vehicle during the confrontation between Officer Nelson and Mr. Sarey.

Who is speaking on the video?

The transcription is below.

0:35:14.862 **Ofc. Nelson:** I, I told you to stop kicking stuff, stop throwin' stuff, right?

0:35:18.800 **Mr. Sarey:** ...agree.

0:35:19.443 **Ofc. Nelson:** OK, so now you gotta put your hands behind your back. OK?

0:35:24.170 **Ofc. Nelson:** You gotta put your hands behind your back.

0:35:25.429 **Mr. Sarey:** [cross talk] ...not kicking anything though.

0:35:26.763 **Ofc. Nelson:** Huh?

0:35:27.081 **Mr. Sarey:** I'm not kicking anything.

0:35:28.552 **Ofc. Nelson:** OK.

0:35:31.866 **Ofc. Nelson:** You're under arrest...

0:35:33.093 **Mr. Sarey:** [unintelligible]

0:35:33.757 **Ofc. Nelson:** ...for disorderly conduct.

0:35:36.293 **Ofc. Nelson:** OK.

0:35:47.998 **Ofc. Nelson:** Put it down.

0:35:50.004 **Mr. Sarey:** You need to stop pushin' me bro.

0:35:51.077 **Ofc. Nelson:** Hey, listen to me [cross talk]

0:35:51.947 **Mr. Sarey:** Keep your hands off of me.

0:35:56.639 **Mr. Sarey:** Hey, what the hell are you doing to me...

0:35:58.738 **Ofc. Nelson:** [unintelligible]

0:35:59.768 **Unknown:** [unintelligible] ...under arrest [unintelligible] fuckin' stupid
ass [unintelligible cross talk]

0:36:05.985 **Unknown:** [unintelligible]

0:36:08.309 **Mr. Woodard:** Stop resisting dude, just go down.

0:36:10.065 **Mr. Sarey:** [unintelligible] ...doing anything wrong.

0:36:11.560 **Mr. Woodard:** Bullshit, you're not. [unintelligible cross talk]

0:36:13.044 **Mr. Woodard:** Oh my god.

0:36:16.400 **Mr. Woodard:** Oh my god.

0:36:19.271 **Mr. Woodard:** Holy shit, he just shot him.

This transcription was done by David Hallimore, Recorded Evidence Solutions, LLC. It transcribes time segment 00:35:14 to 00:36:20 (hr:min:sec) from left channel of stereo audio extracted from COBAN in-car video recording 5612@20190531173948.mpg. The audio file name: Enh Audio copy_5612@20190531173948_L.wav

Why not charge first-degree murder?

Washington State Law requires us to prove premeditation beyond a reasonable doubt for Murder in the First Degree. The second shot fired by Officer Nelson was not the fatal shot.

What are the police case numbers involved in the investigation?

Port of Seattle Police Department for case number 19-38910 and 19-2019.

Auburn Police Department incident number 19-06470.

Des Moines Police Department incident number 19-1402.

Federal Way Police Department incident number 190006706.

Renton Police Department case number 2019-6078.

Kent Police Department Case Report number 19-7614 (and attached reports).

Tukwila Police report number 19-3220 (and the investigations and reports of experts).

The King County Superior Court case number is 20-1-06432-3.

Has your decision been impacted by events around the country focusing on police use of force?

Our process in this case has been ongoing for more than a year, and it began well before the death of George Floyd. Our decision reflects the voter-approved changes brought by I-940 and is based on the investigation of the Valley Investigations Team and the opinions provided by our experts. The voter-approved changes make clear that there should be an increased role for juries to decide whether a particular application of deadly force by law enforcement constitutes a crime.

Why did you file charges in this case, but not the other officer-involved shootings that have occurred in recent years such as the 2017 shooting death of Charleena Lyles or the 2010 death of the late John T. Williams?

Simply put, our office is prosecuting this case under the new legal standards established by I-940 – standards which did not exist prior to 2019. The law is clear that an individual can only be held accountable for their actions based on the law at the time the act was committed.

The shooting deaths of Charleena Lyles, the late John T. Williams and others are required to be reviewed under the law prior to voter approval of I-940, and those previous standards required us to show that officers acted with “malice” and a lack of good faith. That was essentially an impossible standard to meet, which is why no officers were convicted of shootings between 2005 and 2014. (Only one case was charged in Snohomish County.)

As the Seattle Times reported, in 1986, Washington’s Legislature decided police officers shouldn’t be prosecuted for killing someone in the line of duty as long as they acted in good faith and without malice, or what the law calls “evil intent.” Before I-940, that was an almost perfect defense to mistaken uses of force that kept police officers out of court as defendants.

In the case of Ms. Lyles, our office has spoken firsthand to the family members of Charleena Lyles, and we know this is an incredibly difficult and tragic incident. Our hearts always go out to every victim of violence, and we will continue to work with Ms. Lyles’ family. Charleena Lyles death was one of several cases slated for an inquest that was put on hold as King County Executive Dow Constantine reexamined the process and responded to legal challenges. On June 9, 2020, the City of Seattle dropped its suit, removing a key barrier for the inquest process to move forward. However, lawsuits from other municipalities within King County remain.

The PAO will continue to carefully scrutinize all conduct in criminal cases that are referred to our office – including independent reviews of police misconduct. We’ll be accountable to those decisions, and they’ll continue to be public.

Was there an inquest in this case? If not, will there be one in the future?

There has not been a King County inquest with this case. Today’s filing decision does not preclude an inquest from taking place in the future.

*****Additional Q&A Below Transcribed from 8/20/20 Press Conference*****

This is the first prosecution of an officer for unjustified use of deadly force under I-940. How many prosecutions were there under the previous standard?

Before I-940 a prosecutor had to prove beyond a reasonable doubt evidence of malice – that is evil intent – and frankly most of us didn’t even know what that might look like. And most of the cases didn’t get anywhere close to proving the personal animus that is associated with malice so since that law was passed in 1986 there was one prosecution in Snohomish County brought about by Mark Roe, the Prosecuting Attorney, and the jury ultimately acquitted that officer. I believe they were hung up on malice and they didn’t see it in that case, so since I-940 passed we don’t have that barrier anymore.

I think the requirement for malice made it easy on prosecutors to say “we didn’t see anything here, we couldn’t file this case so we declined it” and I think the message from the voters was pretty clear – they didn’t want this to be easy, they wanted it to be the case where we had to spend some time carefully analyzing the reasonable officer standard, among other things, and really have prosecutors have less of a gatekeeping role and more of a role to present these cases where they were sufficient to a jury. I don’t think this means that they’ll be a lot more of these cases; it went from being impossible to being merely difficult. Today it is merely difficult to prove that a person’s conduct is outside the range of what a reasonable officer in similar conditions would have done – it does require expert witnesses and we have those, and we’ve taken our time in this case to make sure we had the evidence we needed. So we went from having none of these cases essentially to having the possibility of bringing these cases in front of a jury, but again I want to stress that these are going to be very rare, and very difficult for us to prove. Because most of these cases are not close – somebody had a weapon, somebody attacked an officer, something like that, and a reasonable officer has the right to defend themselves and would. In this case I think it stands on its own, we want to make sure that you saw the video so you could see for the first time what we’ve looked at a hundred times and understand why Officer Nelson should be judged by a jury for his conduct for taking the life of Jesse Sarey.

Are you seeking bail in this case?

The reason we are not seeking to detain Officer Nelson during the pendency of this matter is that he has been in the area, he has been employed since the shooting date, and there is no reason to think that he will not appear to face these charges. We will however at the first appearance seek an individual order to bar him from using firearms until this matter is resolved.

Will the Auburn Police Department (PD) be suspending Officer Nelson’s pay while he awaits trial?

That’s a question for Auburn PD.

To what extent, if at all, did Officer Nelson’s history of using force factor into this case?

It’s a fair question, but the answer is it did not. This case was decided solely on the evidence of this event on May 31, 2019, and nothing else. For those other matters you’ll have to ask Auburn PD.

Investigators originally claimed that Mr. Sarey reached for Officer Nelson’s gun. Is that no longer the case, and if he had reached for the gun would that have justified the use of force?

I think those facts are dealt with in the certification for determination of probable cause. There was a scuffle, and the eyewitness is crucial here as well – the eye witness, Mr. Woodward, saw the whole thing and tried to intervene and deescalate the situation and get Mr. Sarey to just drop down. I believe he mentions that he saw Mr. Sarey’s hand brush the holster, it’s a multi-function holster that takes a lot of different pressures to get the gun to release, so there’s no evidence that he grabbed the gun or had possession of the gun. During the scuffle Mr. Sarey may well have touched it but those are the kinds of things that the jury will consider. During the first shot Mr. Sarey was against the freezer box; the first shot was shot through the torso and after that point Mr. Sarey really was not a danger to anybody, and if you read the new law the justifiable homicide has to be based on a belief that the individual posed a serious risk of death or physical injury to other people and the jury can wrestle with that standard on the first shot and the second shot, and the circumstances obviously changed between those two decisions to fire.

Does Mr. Sarey have any known family and have you been in contact with them?

Mr. Sarey has a family. We have been in contact with them – his foster mother and siblings. Mark Larson and Kathy Van Olst met with them on Wednesday (8/19/20), and similarly we met with the leadership of the City of Auburn on Wednesday and we also met with the attorney of the Officer – so everyone got some heads up.

What kind of message does this send to law enforcement across the state?

We’re not in the business of sending messages – we analyze individual cases and look at the law and look at the facts. And in this case, because the law had changed this is a case of first impression for us. And so one of the reasons we wanted to have this press conference is to remind people that they voted for Initiative 940, and the law now removes the prohibitive element of malice and has created a new standard of what a reasonable officer would do under similar circumstances. So there isn’t a larger message to anybody other than we’ve got a new law and this is the first time that we’ve used it, but again we are going to do deep dives into individual fact patterns and we will need experts to tell us as to when an officer has acted outside the range of what a reasonable officer would do.

Mr. Sarey’s family had a rally less than two weeks ago. Did that play a factor in the timing here? Also, these charges are being brought during a tense time in policing, can you speak to that?

The timing is a function of having to wait for experts to produce reports and then have us digest and discuss those reports. It has nothing to do with any protest or any political pressure – in fact it’s kind of been surprising that there hasn’t been more coverage of this shooting given how much coverage there has been of other officer involved shooting cases. But it isn’t a function of anything other than the amount of time it took us to take the raw investigation, to add to it the expert work that needed to be done to make it more intelligible to us and ultimately something that a jury can understand.

Has Auburn PD cooperated with your office during the investigation? Also, how did the independent investigation go under the I-940 requirements?

The valley cities (of which Auburn PD is a part) have for a long time had an independent investigative agreement, so neighbor cities would investigate officer involved shootings that happened in other cities. The Washington Administrative Codes (WAC) lay out in great detail what an independent investigation looks like under I-940, but those particular WACS were adopted after this case, so at the time that this event happened the Port of Seattle Police team – being next up in the Valley Investigative Team – handled the case according the rules that were in place at that time. The administrative code post-dated that work – so the next one that happens will have a new set of rules about involvement of community members, public information, those sorts of things, that were not in place when this investigation took place.